Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF CALIFORNIA,

Petitioner,

v.

CELESTUS BLAIR, JR.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May a district court declare a state statute unconstitutional in a reported order granting declaratory judgment where non-state litigants moot the controversy and deprive the State, appearing as a government intervenor, of both an opportunity to obtain appellate review and the right to vacate the declaratory judgment?

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LIST OF ALL PARTIES

Listed below are the parties to the proceedings in the court whose judgment is sought to be reviewed:

CELESTUS BLAIR, JR., Plaintiff-Appellee;

STEVEN SHANAHAN, JAMES LASSUS, STEPHEN PAULSON, FRANK JORDAN, CITY OF SAN FRANCISCO, Defendants-Appellants;

PEOPLE OF THE STATE OF CALIFORNIA, Intervenor-Appellant.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF CALIFORNIA,

Petitioner,

v.

CELESTUS BLAIR, JR.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on October 31, 1994, with rehearing denied and rehearing en banc denied on December 28, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported at 38 F.3d 1514 (1994). A copy of the opinion is attached to this petition as Appendix A. A copy of the unreported order denying rehearing and rejecting rehearing en banc is attached as Appendix B. The opinion and order of the district court denying petitioner's motion to vacate the judgment entered pursuant to Federal Rule of Civil Procedure 68 was reported at 795 F.Supp. 309 (N.D.Cal. 1992) and is attached as Appendix C.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on October 31, 1994. Rehearing was denied and rehearing en banc rejected on December 28, 1994. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Title 28, section 2403 provides:

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights and liabilities of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit or proceeding in a court of the United States to which a State or any agency, officer or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the

State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights and liabilities of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

STATEMENT OF THE CASE

Celestus Blair, Jr. (Blair), a former panhandler, brought a civil rights action against the City and County of San Francisco and various officers (City), for equitable relief and damages arising from the City's enforcement of California's statute outlawing aggressive panhandling. Cal. Penal Code § 647(c).[1/] Blair, who was employed by the City at the time of the dispute and no longer panhandled, contended the state law was unconstitutional. The district court had jurisdiction to hear the matter pursuant to 28 U.S.C. §§ 2201, 2202, 1331, and 1367(a). The State of California (State) intervened pursuant to 28 U.S.C § 2403(b) to defend its statute.

The district court ultimately granted declaratory judgment, holding California Penal Code § 647(c) unconstitutional on its face. *Blair v. Shanahan*, 775 F.Supp. 1315, 1329 (N.D. Ca. 1991). The district court set the case for trial on the issue of Blair's damage claims against the City but denied the State's and City's motions under Federal Rule of Civil Procedure 54(b) to certify an interlocutory appeal of the declaratory judgment. *Blair v. Shanahan*, 38 F.3d at 1517 (App. A at 24); Exhibits 5

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1. California Penal Code § 647(c) provides:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms. . . .

and 6.[2/]

Thereafter, Blair accepted the City's offer of judgment under Federal Rule of Civil Procedure 68, settling the damage claims and allowing judgment to be taken *against the City* on the claim for declaratory relief "in accordance with the Court's Opinion and Order" holding California Penal Code § 647(c) unconstitutional. *Blair v. Shanahan*, 795 F.Supp. at 312 (App. C at 55). The State was not a participant in settlement discussions or a party to the Rule 68 offer of judgment. Exhibits 8, 9, and 10.

The State moved (as did the City) to vacate the consent judgment under Federal Rule of Civil Procedure 60(b), fearing that the Rule 68 judgment might imperil the appealability of the declaratory judgment. The district court denied the motion and ruled the State had no standing as an intervenor under 28 U.S.C § 2403(b) to bring or argue such a motion. *Blair v. Shanahan*, 795 F.Supp. at 317-19 (App. C at 72). The state timely appealed.

A panel of the Court of Appeals determined that it had no Article III jurisdiction to review the district court's declaratory judgment. By settling his damage claims pursuant to the Rule 68 offer of judgment, Blair lost the remaining personal stake in the related declaratory judgment, which he otherwise had no standing to bring, and eliminated any live case or controversy supporting appellate jurisdiction. *Blair v. Shanahan*, 38 F.3d at 1519-

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2. Reference is to the Appendix of Exhibits filed in the Court of Appeals by the State on June 19, 1992, in conjunction with its Opposition to Blair's Motion to Dismiss.

20 (App. A at 28-29). The Court of Appeals agreed with the district court that the State had no standing to move to vacate the consent judgment (which by its terms provided relief in accordance with the district court's earlier declaratory judgment). *Id.* at 1522 (App. A at 36).

Pursuant to the practice of the Ninth Circuit where an appellant destroys appellate jurisdiction by settling the case, a majority of the Court of Appeals panel voted to remand to the district court on the question whether to vacate the declaratory judgment. *Id.* at 1521 (App. A at 33). In resolving the question, the district court was directed to "take into account whether the City thought that the declaratory judgment would be unreviewable due to settlement. If the City would not have known it was mooting its appeal of the declaratory judgment, that fact equitably weighs in favor of vacating the judgment." *Id.* at 1521 (App. A at 33).

The dissent urged a different course: Vacatur of so much of the district court's judgment as declared the state statute unconstitutional and remand to the district court with instructions to dismiss the complaint. *Id.* at 1522, 1525 (App. A at 37-38, 44). The dissent reasoned that "this is not a case in which the appellant has 'caused' his appeal to be mooted in order to 'destroy the collateral consequences of an adverse judgment.' Rather, here the City consented to final judgment in the district court with the intent to pursue an appeal of the disputed constitutional issues as the record reveals." *Id.* at 1524 (App. A at 41-42).

Approximately one week after the issuance of the Court of Appeal's opinion, this Court decided *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, __ U.S __,

115 S.Ct. 386, 130 L.Ed.2d 233 (1994) (*U.S. Bancorp*). Thereafter, the State unsuccessfully sought rehearing and rehearing en banc, urging that vacatur was required given this Court's articulation in *U.S. Bancorp* of the equitable principles applicable to an appellate court's decision whether to vacate a civil judgment that becomes moot on appeal. Those principles, considered in light of the State's inability to adjudicate its interests on appeal because of the unilateral action of the City and Blair, compelled vacatur of the district court's judgment, thereby eliminating any precedential or *stare decisis* effect chilling enforcement of California Penal Code § 647(c).

ARGUMENT

The Court of Appeals has found that the litigation decision of a former panhandler and a city attorney forecloses the State from seeking review of a lone district judge's reported opinion invalidating a state criminal statute. According to the majority opinion, the only remedy to avoid the precedential or *stare decisis* effect of that unreviewable, reported judgment on every law enforcement agency in California is a remand on the question of vacatur to the district court to consider what "the City thought" it was doing when it mooted the litigation which spawned the unreviewable judgment.

This disposition resolves the issue of vacatur only as to Blair and the City. Were they the only parties with an interest in the district court's declaratory judgment, a remand would be consistent with this Court's recent decision in *U.S. Bancorp.* The Court of Appeals' disposition, however, makes the question of vacatur dependent on the City's thought process in entering into the consent judgment. It makes irrelevant the equities of the State, which appeared in the litigation as a separate, statutory party intervenor under 28 U.S.C § 2403(b), and which was neither a participant in the settlement negotiations nor a party to the Rule 68 judgment.

The relatively few references to the State, and the total silence as to the State's equities, in both the panel's majority and dissenting opinions show the anomaly. It is the State which suffers the practical effect of the district court's reported declaratory judgment. *See Smith v. Pangilinan*, 651 F.2d 1370, 1325 (9th Cir. 1981) (*stare decisis* source of practical impairment to intervening party's

rights). Accompanied by the specter of punitive and compensatory damages under 42 U.S.C § 1983, that judgment haunts and thereby chills statewide enforcement of California's statute criminalizing aggressive panhandling. Yet, the State is essentially unseen by the Court of Appeals in its disposition of the district court's declaratory judgment; the State's right of vacatur is made totally dependent on the unilateral action and designs of an independent party whose interest in defending the constitutionality of the statute may be entirely different from the State's.[3/]

The remedy of remand to the district court to determine *the City's* intentions in consenting to a judgment mooting the appeal is therefore not adequate. It is not adequate because on remand the equitable position of the City will fully control the State's entitlement to relief. Not only do the State's interest and equities become irrelevant on the question of vacatur under the Court of Appeals' opinion, but even the State's standing on remand to participate in a Rule 60(b) motion to vacate the judgment is in question.[4/]

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3. A current example of how political views diverge on the constitutionality of state laws is the City of Los Angeles's intervention under Rule 24 *in support* of challenges to California's enforcement of Proposition 187, a voter initiative which seeks to limit governmental services to illegal immigrants. *See Gregorio T. v. Wilson*, CV 94-7652 MRP (C.D. Cal.).

4. The Court of Appeals concluded that the State had no standing to participate in a Rule 60(b) motion to vacate the consent judgment. *Blair v. Shanahan*, 38 F.3d at 1522 (App. A at 36). The State's standing on remand appears to be no better positioned, since remand to consider vacatur of a judgment following mootness also occurs pursuant to Rule 60(b). *See U.S. Bancorp Mortgage Company*

The potentially unreviewable, yet precedential, effect of the district court's declaratory judgment cannot be squared with Congress's implicit recognition in 28 U.S.C § 2403(b) that the State is the party most affected by a suit drawing into question the constitutionality of a state statute. This Court has recognized the State's stake as an intervenor in the outcome of such litigation to be "substantial." *Maine v. Taylor*, 477 U.S. at 136. A state "clearly has a legitimate interest in the continued enforcement of its own statutes," *id.*, and federal

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v. Bonner Mall Partnership, 115 S.Ct. at 393, 130 L.Ed.2d at 244.

The Court of Appeals' conclusion that the State had no standing to participate in the Rule 60(b) motion is perplexing. The conclusion rests on the unstated assumption that intervention under 28 U.S.C § 2403 carries fewer procedural rights than intervention under Federal Rule of Civil Procedure 24(a)(2) because § 2403 intervention is limited solely to the government intervenor's presentation of the facts and law relating to the question of constitutionality. *Blair v. Shanahan*, 38 F.3d at 1522 (App. A at 36).

That view plainly overlooks the statute's language, which gives a government intervenor "all the rights and liabilities of a party. . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." 28 U.S.C § 2403(a) and (b); *Maine v. Taylor*, 477 U.S. at 136. It is one thing to say a government intervenor under § 2403 cannot pursue matters unrelated to its appearance, an appearance directed solely to defending the constitutionality of a statute. That principle is unremarkable. *See Ruotolo v. Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1982). It is quite another to strip a government intervenor -- in this case the State -- of a procedural remedy, like Rule 60(b), which is normally available to every civil litigant.

If the State cannot move under Rule 60(b) to vacate an errant district court judgment declaring its statute unconstitutional "to the extent necessary" to preserve the question of constitutionality on review, the State is helpless against inadvertent or collusive consent judgments striking down its laws. Without the necessary procedural remedies, the State's substantive right to intervene and argue the constitutionality of its statute becomes illusory.

nullification "is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution . . . ." *Id.* at 135. When the State properly appears under 28 U.S.C. § 2403(b) to defend the constitutionality of its statutes, it is a "party." *Diamond v. Charles*, 476 U.S. 54, 62 (1985).

A consent judgment resulting from the agreement of parties other than the State should not render a district court's declaratory judgment both unreviewable on the State's appeal *and* immune to mandatory vacatur if the State did not participate in mooting the case. If it were otherwise, Blair and the City would impermissibly be settling the rights of the State without its agreement. *Cf. Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). Such a result would defeat the unconditional opportunity which Congress provided the State under 28 U.S.C. § 2403(b) to intervene and protect its laws from judicial repeal by the actions, strategies, or inadvertence of other parties. *See* Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 Harv.L.Rev. 319, 327 (1951).

As it affects the State, the Court of Appeals' opinion also cannot be squared with the equitable principles recently articulated in *U.S. Bancorp*, a case in which this Court declined to extend the vacatur rule of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), to settlement. The precise issue presented was "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." 115 S.Ct. at 388-89, 130 L.Ed.2d 238. The Court answered that they should not if mootness was caused by settlement involving the party seeking the vacatur, absent exceptional

circumstances counseling in favor of such a course. 115 S.Ct. at 393, 130 L.Ed.2d at 244. The reason lay in the "lack of equity of a litigant who has voluntarily abandoned review." 115 S.Ct. at 393, 130 L.Ed.2d at 244.

By the same token, *U.S. Bancorp* has not abandoned the principle that "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court." 115 S.Ct. at 390, 130 L.Ed.2d at 240. The case teaches that equity favors the party who, without fault, is blocked from seeking relief through the prescribed primary route of appeal. Vacatur relief is still appropriate under *Munsingwear* "when the demands of 'orderly procedure' . . . cannot be honored. . . ." 115 S.Ct. at 392, 130 L.Ed.2d at 243. Accordingly, although *Munsingwear* does not apply where the party seeking relief from judgment below caused the mootness by voluntary action, the "equitable tradition of vacatur" mandates that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness to be forced to acquiesce in the judgment." 115 S.Ct. at 391, 130 L.Ed.2d at 242.

In the present case, the panel majority found that "the City rendered the appeal moot by its own act of proposing a consent judgment which satisfied the claims for damages." *Blair v. Shanahan*, 38 F.3d at 1520-21 (App. A at 32). The question whether "the City thought" its action made the declaratory judgment unreviewable, thereby militating against vacatur, falls now to the district judge to determine and weigh on remand. *Id.* at 1521 (App. A at 33). But it is a wrong and irrelevant question insofar as it implicates the State's interest in vacatur. The

remand ignores the equities of the party whom the determination most fundamentally affects. It conflicts with this Court's understanding about the fundamental predicate of vacatur: "The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 115 S.Ct. at 391; 2130 L.Ed.2d at 241.

Here, the State was not responsible for the mootness. It was not a party to the consent judgment or even a participant in its formation. Nor is this a case in which the State in effect has declined to pursue its appeal. Indeed, it was the State's position that the Court of Appeals retained Article III jurisdiction to resolve the constitutional issue notwithstanding the consent judgment. *See* State of California's Supplemental Brief at 3-9, filed August 4, 1994, in the Court of Appeals.

As a party by statutory right, the State is entitled to defend its laws or, in the alternative, to be protected from the unreviewable *stare decisis* effect of a lower court ruling, regardless of what the City "thought" was going to happen on settlement. There is no value in the State's right to intervene to defend the constitutionality of its law if the declaratory judgment is left unvacated in the face of unilateral action by Blair and the City which prevents the State from arguing the issue on appeal.[5/] To borrow a gaming analogy used by the district court, *Blair v. Shanahan*, 795 F.Supp. at 319 (App. C at 72), Blair and

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5. A government intervenor under 28 U.S.C. § 2403 has a right of direct appeal from a holding of unconstitutionality, independent of whether any other party to the action appeals. *See Heckler v. Edwards*, 465 U.S. 870, 882-83 (1984) (United States); *Maine v. Taylor*, 477 U.S. at 136 (State).

the City should not become super litigants who may trump the statutory right of the State to defend the constitutionality of its law by collusive or inadvertent deals. Without vacatur, private litigants hold the trump hand.

The equities in this case rest with the State. They compel vacating so much of the district court's judgment as declared California Penal Code § 647(c) unconstitutional.[6/] Under the Court of Appeals' opinion, however, a state or federal law may be found unconstitutional in a reported district court opinion where the intentional or inadvertent action solely of private litigants moots the controversy and deprives the government both of an opportunity to obtain appellate review and the right of vacatur. Such a result defeats the intent of Congress in enacting 28 U.S.C § 2403 and disables a government intervenor -- whether state or federal -- from protecting its laws from the unilateral repeal of private litigants.

Finally, the issue which this case presents is more than unsettled; it is unexplored. The novelty of the issue is matched by its importance. The Court of Appeals' opinion diminishes the protection which Congress granted a state to defend its laws in federal court. While diminishing that protection, the opinion simultaneously enhances the opportunity, intentional or inadvertent, for judicial nullification of state statutes by parties who bear no responsibility to protect those laws and who have no

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6. Under 28 U.S.C § 2106, a federal appellate court may order vacatur in any litigation in which it has been determined that the requirements of Article III no longer, or never were, met. *U.S. Bancorp*, 115 S.Ct. at 389-90, 130 L.Ed.2d at 239.

necessary, institutional interest to ensure their survival. We ask this Court to connect the equitable principles of *U.S. Bancorp* to the right of a state intervenor to defend the constitutionality of laws its citizenry has charged it to enforce.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED: February 21, 1995

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APPENDIX A

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CELESTUS BLAIR, Jr.,
Plaintiff-Appellee,

v.

STEVEN SHANAHAN; JAMES LASSUS; STEPHEN PAULSON; FRANK JORDON; City of San Francisco,
Defendants-Appellants,

and

PEOPLE OF THE STATE OF CALIFORNIA,
Intervenor.

No. 92-15447
D.C. NO.
CV 89-04176 WHO

OPINION

CELESTUS BLAIR, Jr.,
Plaintiff-Appellee,

v.

STEVEN SHANAHAN; JAMES LASSUS; STEPHEN PAULSON; FRANK JORDON; City of San Francisco,
Defendants-Appellants,

and

PEOPLE OF THE STATE OF CALIFORNIA,
Intervenor.

No. 92-15450

CELESTUS BLAIR, Jr.,
Plaintiff-Appellant,
Cross-Appellee

v. No. 92-15451

STEVEN SHANAHAN;
JAMES LASSUS;
STEPHEN PAULSON;
FRANK JORDON; City
of San Francisco,
Defendants-Appellees
Cross-Appellants
and

PEOPLE OF THE STATE OF
CALIFORNIA,
Intervenor-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted
December 16, 1993 - San Francisco, California

Submission Deferred July 14, 1994
Resubmitted September 27, 1994
Filed october 31, 1994

Before: J. Clifford Wallace, Chief Judge, Leonard I. Garth* and Charles Wiggins, Circuit Judges

---

*Honorable Leonard I. Garth, United States Circuit Judge, Third Circuit Court of Appeals sitting by designation.

COUNSEL

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Michael C. Hallerud, Pettit & Martin, San Francisco, California for the plaintiff-appellee, cross-appellant.

Enid A. Camps, Deputy Attorney General, San Francisco, California, for the intervenor-appellee, cross-appellant.

Kent S. Scheidegger, Sacramento, California, for the amicus.

OPINION

WALLACE, Chief Judge:

The City and County of San Francisco (City) and intervenor State of California (State) request us to review a decision of the district court, *Blair v. Shanahan*, 775 F.Supp. 1315 (N.D. Cal. 1991) (*Blair I*), declaring facially unconstitutional under the First and Fourteenth Amendments a state statute criminalizing aggressive panhandling. Cal. Penal Code § 647(c). That statute provides that anyone "[w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" is guilty of a misdemeanor. *Id.* After he was arrested several times for alleged violations of section 647(c), Blair brought this action, and damages were agreed upon in a subsequent settlement. He now argues that we should dismiss the appeal from the district court's declaratory judgment for lack of jurisdiction.

The City also asks us to review the district court's

order refusing to vacate a consent judgment entered pursuant to Federal Rule of Civil Procedure 68, which settles Blair's claim for damages against the City for a sum of $4,000. Because we hold that the district court did not abuse its discretion in denying the motion to vacate, the consent judgment remains in force.

Blair cross-appeals, contending that the district judge inappropriately refused him damages because section 647(c), violates the California Constitution. In addition, the State and City appeal from the refusal of the district court to allow a Rule 54(b) interlocutory appeal of its ruling that section 647(c) was unconstitutional.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2201, 2202, 1331, 1343, and 1367(a). Our jurisdiction over this timely appeal is suggested under 28 U.S.C. § 1291. We affirm, except for the attempted review of the determination that section 647(c) was unconstitutional. As to that issue, we dismiss as moot and remand to the district court to consider whether its unconstitutionality determination should be vacated.

I

Blair was arrested at least five times for allegedly begging in violation of California Penal Code § 647(c), but was never charged. He sued pursuant to 42 U.S.C. § 1983, seeking compensatory and punitive damages from the City, individual police officers and the Chief of Police. Among his complaints were that the defendants violated his First, Fourth and Fourteenth Amendment rights. Blair also sought a declaration that section 6479c) is unconstitutional under the First and Fourteenth

Amendments and a permanent injunction against its further enforcement.

At the time that he sued, Blair was no longer engaged in begging and had found steady employment. The City argued that because Blair no longer begged, he no longer had a personal stake in the outcome of the equitable claims, so that the district court lacked Article III jurisdiction to decide them.

The parties filed cross-motions for summary judgment. The district court held that it had equitable jurisdiction over the claims for damages. The court reasoned that under our precedents, the presence of claims for damages which rely on facts and legal conclusions identical to those present in an equitable claim, creates a personal stake in the equitable claim which satisfies Article III requirements. *Blair I*, 775, F. Supp. at 1319, *citing Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984) (*Giles*), *cert. denied*, 417 U.S. 1053 (1985), and *Smith* v. *City of Fontana*, 818 F.2d 1411 (9th Cir. 1986), *cert. denied*, 484 U.S. 935 (1987). The court stated, "[T]he possibility of Blair suffering further injury is not immediate enough to warrant a grant of standing in a proceeding *based* solely on a claim for equitable relief. Blair's claim for injunctive relief, however, is inextricably intertwined with his personal stake in the related claims for damages." *Blair I*, 775 Supp. at 1319. After deciding it had jurisdiction, the district court granted Blair's request for a declaratory judgment, holding that section 647(c) was unconstitutional on its face.

The court denied the request for a permanent injunction. Because Blair no longer begged, he could not make the needed showing irreparable injury. *Id.* at 1320.

Finally, in considering the claims for damages, the court held that the existence of disputed facts required that the resolution of those claims would have to wait until trial. *Id.* at 1329.

Although the damages claims were not yet resolved, the City and State wanted to obtain review of the declaration that section 647(c) was facially unconstitutional. They unsuccessfully moved the district court to certify an interlocutory appeal under Federal Rule of civil Procedure 54(b). *See Blair v. Shanahan*, 795 F.Supp. 309, 311 (N.D. Cal. 1992 (*Blair II*) (discussing procedural history).

Thereafter, the City and Blair entered into settlement negotiations regarding the remaining claims. Blair proposed to the City an offer of judgment which would establish liability for First Amendment violations, among others, but which would "provide expressly that the City's rights to seek appellate review of the Court's determination that § 647(c) violates the First Amendment are not impaired by this stipulation." *Id.* (Summarizing settlement offer.)

The City never accepted or rejected this offer, but proposed its own offer of judgment under Federal Rule of Civil Procedure Rule 68, which Blair accepted unconditionally. *See id.* at 312. In the offer, the City allowed judgment to be taken against it on Blair's claims of false arrest and violations of the First, Fourth and Fourteenth Amendments with respect to his arrest on four different occasions. It proposed allowing an award of damages to be taken against it in the total amount of $4,000. The City also allowed judgment to be taken against it on the claim for declaratory relief "in accordance with the Court's Opinion and Order." *Id.* In addition, all

records of the arrests would be expunged. The remaining claims were to be dismissed and all defendants other than the City were to dismissed with prejudice. The offer was silent as to the City's right to appeal.

The district court conducted a hearing regarding the offer of judgment and expressed its view that the judgment, as constructed, might preclude an appeal of the declaratory judgment. During this hearing, the city stated that it believed it could appeal the declaratory judgment; Blair disagreed. The district court then entered judgment pursuant to Rule 68. *Id.* at 312-13.

Apparently beginning to doubt that the declaratory judgment was appealable under the terms of the Rule 68 judgment, the City moved the district court to modify or vacate the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. It argued that there was a misunderstanding and mistake in the formation of the agreement: Blair believed that the judgment would preclude an appeal, while the city thought an appeal was allowed. The district court denied the motion. *Id.* at 313-17.

II

The City asks us to review the district court's denial of the rule 60(b) motion to vacate or modify the offer of judgment. Motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) are committed to the sound discretion of the trial judge. *Thompson v. Housing Authority*, 782 F.2d 829, 832 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986). We will not reverse the decision absent an abuse of discretion. *Floyd v. Laws*, 929

F.2d 1390, 1400 (9th Cir. 1991).

The City fails to point out how the district court abused its discretion. At most, the City repeats to us the legal arguments that it made to the district judge's resolution. However, we do not review the district court's decision de novo. Under our review, we hold there was no abuse of discretion. On the contrary, its discussion of the reasons for refusing the motion are persuasive and compelling. *See Blair II*, 795 F.Supp. 313-17.

The City argues that there was a mutual mistake in forming the agreement, since both Blair and the City thought that the judgment would preserve appeal rights. In the alternative, it argues that there was no meeting of the minds about the agreement if Blair did not intend to preserve appeal rights while the City did have such an intention. The simple fact is, however, that the right to appeal was not a term of the agreement. At most, the mistake or misunderstanding was in the parties' estimation of the future affect that the agreement would have on the right to appeal. As a result, there is no compelling reason to apply the mutual mistake analysis to the appealability issue. It was within the district court's discretion to reject Rule 60(b) motion for this reason alone. The consent judgment stands.

III

Even thought it consented to entry of judgment and the consent judgment is silent as to any right to appeal, the City argues that it is not barred by the terms of the consent judgment from appealing the district court's order declaring section 647(c) facially unconstitutional. However,

before we can determine whether the terms of the consent judgment bar an appeal, we must first decide, as a threshold matter, whether we are deprived of Article III jurisdiction to look at the issue because of the consent judgment's resolution of the damage claims.

The district court held that it had jurisdiction to entertain Blair's request for a declaratory judgment only because of the presence of the claims for damages. Blair would not otherwise have standing because he was no longer a panhandler. *Blair I*, 775 F.Supp. at 1318-20. The resolution of those damage claims brought about by the consent judgment, raises obvious questions about whether the declaratory judgment remains an actual case or controversy which we may review.

"Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). If Blair was lost standing to request declaratory relief due to the absence of the claims for damage, the case becomes moot, and we may not exercise jurisdiction. The Supreme Court has described "mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout is existence (mootness).'" *United States parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) (*Geraghty*), *quoting* Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973).

The problem with Blair's standing to request

declaratory relief is his lack of a legal interest in the enforceability of the statute, as it is unlikely that he will ever again desire to panhandle. Article III requires that Blair have "a legal cognizable interest in outcome" of the litigation. *Geraghty*, 445 U.S. at 396. This concept has been referred to as the "personal stake requirement." *Id.* To establish a personal stake, Blair "must show that 'he has sustained or is immediately in danger of sustaining some direct injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (*Lyons*). However, in the context of Blair's request for declaratory or injunctive relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 102, *quoting O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *see also Smith*, 818 F.2d at 1421 n. 17 (standing that the same test applies both requests for declaratory and injunctive relief).

The personal stake requirement "serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving." *Geraghty*, 445 U.S. at 397. The presence of a personal stake assures "concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." *Lyons*, 461 U.S. at 101 (internal quotations omitted).

Contrary to what the City argues, the personal stake requirement does not disappear in a First Amendment challenge. Admittedly, courts have applied relaxed standing rules to First Amendment challenges. *See Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989) (*Ripplinger), citing City Council v.Taxpayers for Vincent*, 466

U.S. 789, 798-99 (1984); *Virginia v. American Booksellers Ass'n*, 484 U.S.s 383, 392 (1988). However, neither we, nor the Supreme Court have ever allowed plaintiffs to challenge a statute unless the plaintiffs had an "actual and well founded fear that the law will be enforced against *them*." *Id.* (emphasis added). We have consistently inquired whether the plaintiffs showed a reasonable threat of prosecution under the statute. *See, e.g., Ripplinger*, 868 F.2d at 1047; *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987). A "constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

Blair's First Amendment claim for a declaratory judgment is moot if he no longer wishes to engage in activity proscribed by the challenged statute. In *Zwickler*, the plaintiff sought a declaratory judgment that a state criminal statute prohibiting the distribution of anonymous campaign literature violated the First Amendment. Subsequently, it was learned that the plaintiff no longer wished to distribute handbills because the member of Congress who was the target of the campaign would no longer run for office. *Id.* at 106. The case was dismissed because it did not present a justiciable case or controversy. *Id.* at 110.

Steffel v. Thompson, 415 U.S. 452 (1974), reaches a similar result. There the plaintiff sought a declaratory judgment that the use of state trespass statute to cirminalize handbilling against the Vietnam war was unconstitutional under the First Amendment. Because the American involvement in Vietnam had subsided since the filing of the suit, the Supreme Court remanded for the

district court to determine whether petitioner still desired to engage in handbilling. If he would no longer distribute handbills, it could "no longer be said that this case present a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 460 (internal quotations omitted).

Like the hanbillers in *Steffel* and *Zwickler*, Blair lacks the personal stake necessary to litigate his request for declaratory judgment because he no longer wishes to engage in the activity proscribed by the statute that he is challenging.

Several of our cases have created an exception to the personal stake requirement. We have held that when a plaintiff brings both a claim for damages and a related claim for equitable relief in the same lawsuit, a court may still exercise federal jurisdiction over the equitable claim, even though the plaintiff otherwise lacks a present personal stake in the claim for equitable relief. *Smith*, 818 F.2d at 1422; *Giles*, 746 F.2d at 619. This exception is limited to "situations where the two claims involve he same operative facts and legal theory." *Smith*, 818 F.2d at 1423. The *Smith* exception is based on the consideration that the presence of a claim for damages, if it rests on identical facts and legal theories as the claim for equitable relief, guarantees that the plaintiff has a personal stake in establishing the facts and legal theories underlying the claim for equitable relief as well. *See id.* at 1422-23.

This exception cannot apply to Blair at this stage of the litigation. The claims for damages were entirely satisfied in the consent judgment and no longer exist. Consequently, they cannot presently confer a personal

stake in the declaratory.

As the *Smith* exception cannot apply, Blair's lack of a personal stake in the declaratory judgment leaves us without jurisdiction to review the district court's order declaring section 647(c) unconstitutional. As a result, we may not even consider whether the exception articulated in *Smith* gave the district court itself Article III jurisdiction over the declaratory judgment. Therefore, our preceding discussion of the *Smith* exception should not be read as holding that Blair's claims for damages and equitable relief necessarily relied on identical facts and legal theories.

Our holding that the *Smith* exception does not apply to this case on appeal is narrow. As Blair's claims for damages are no longer live, we need not consider whether the *Smith* exception would e otherwise applicable if the damage claims still existed. Nor need we respond to the City's argument that other circuits have rejected the exception we formulated in *Smith*. *See, e.g., Robinson v. City of Chicago*, 868 F.2d 959, 967 (7th Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990.)

Thus, appeal from this claim is dismissed.

IV

The City argues in the alternative that if we hold that we have no jurisdiction to review the declaratory judgment, we should order the district court to vacate its judgment. Normally, "[t]he established practice . . . in dealing with a civil case . . . which has become moot while on its way here . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Untied States v. Munsingwear*, 340 U.S. 36, 39 (1950). However,

"[t]he *Munsingwear* rule is neither statutorily nor constitutionally required. It is equitable in nature, designed to maintain fairness between litigants who have been denied what would otherwise be an opportunity to challenge a prior adverse decision." *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 766 (9th Cir. 1989)

In *Ringsby Truck LInes v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) (*Ringsby)*, we held that the *Munsingwear* procedure of vacating the district court judgment does not apply when the appellant rendered the appeal moot by his own act. *See Continental Casualty Co. v. Fibreboard Corp.*, 4 F.3d 777, 779 (9th Cir. 1993). "The rationale behind this exception is that a dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right to appeal." *Allard v. DeLorean*, 884 F.2d 464, 467 (9th Cir. 1989). In this case, the City rendered the appeal moot by its own act of proposing a consent judgment which satisfied the claims for damages. The *Ringsby* exception applies.

The *Ringsby* exception is based, in part, on preventing a litigant from misusing the automatic vacatur procedure established in *Munsingwear*. Litigants should not be permitted to bring a case, lose in the district court, settle with the winning party, and thereby have the trial court judgment vacated automatically so as to clear the path for another "test case" raising the same issues. But it does not follow that a litigant who does not intend to moot their appeal -- as the City here maintains -- should be excepted from the *Ringsby* rule. To allow such an exception would create the incentive for litigants to plead ignorance of the mootness rules, because the exception

would provide litigants who did not understand that they were mooting their appeal with the benefit of having the lower court judgment automatically vacated -- presumably not a unwelcome result.

Therefore, we will follow our established practice under *Ringsby* of remanding the question of trial judgment vacatur to the district court. The district court must then "balance the consequences and attendant hardships 'between the competing values of finality of judgment and right to relitigation of unreviewed disputes.'" *Id., quoting Ringsby*, 686 F.2d at 722. In balancing these consequences and attendant hardships, however, it is appropriate for the district court to take into account whether the City thought that the declaratory judgment would be unreviewable due to settlement. If the City would not have settled had it known it was mooting its appeal of the declaratory judgment, that fact equitable weighs in favor of vacating the judgment. The constitutional nature of the question is also a consideration.

V

Among Blair's claims were request for damages under the theory that section 647(c) violated the California Constitution. The district court granted summary judgment against Blair on these claims. Blair now cross-appeals from the summary judgment. Because we read the consent judgment to preclude appeal from the summary judgment, we will not review it.

We have previously followed the practice of looking at the language of the consent judgment and other evidenctote in the record to determine whether a party

may appeal following an order entered by consent. *Christian Science Reading Room v. City and County of San Francisco*, 784 F.2d 1010, 1017 (th Cir.), *cert. denied*, 479 U.S. 1066 (1987). The consent judgment does not specifically mention its treatment of the claims that the "remaining" ruling that is specifically referred to is the declaratory judgment. As to that claim the consent judgment states that the City "allow[s] judgment to be taken against it . . . in accordance with the Court's Opinion and Order." *Blair II*, 795 F.Supp. at 312. The consent judgment further states that the referenced relief will be entered as a final judgment under Rule 54 of the Federal Rules of Civil Procedure. The "remaining" claims are to be dismissed. The district court read the consent judgment to mean that "Blair's appeal rights as to the constitutionality of the statute under the California Constitution are foreclosed, because that claim is dismissed with prejudice under the Rule 68 offer." *Id.*

We review the district court's construction of a consent agreement de novo. *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986). We agree with the district court. The offer of judgment resolves, for the sum of $4,000, all of the claims for damages that Blair may have had. He could gain nothing by establishing that he was entitled to relief under the California Constitution. Blair's counsel correctly stated just prior to the entry of the consent judgment, "[w]e do not believe that any appeal can be taken from an order that is procured with the consent of the parties. We believe that this matter is, in fact, concluded." Finally, we cannot reconcile Blair's strenuous argument to us that the consent judgment precludes the City's appeal from the declaratory judgment

but not his appeal from the summary judgment on the state constitutional claims. Both are precluded.

VI

The State raises two issues. First, the State argues that the district court abused its discretion in refusing to certify for interlocutory appeal the declaration that section 647(c) is unconstitutional. We review the refusal to certify an interlocutory appeal under Rule 54(b) for an abuse of discretion and give substantial deference to the district court *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir. 1991).

There was no abuse of discretion. The district court fully considered the motion for interlocutory review and gave a reasoned explanation for its denial: it was expected that a short bench trial was to begin in only four months, and the entire case could be reviewed after trial.

The City argues that the denial of the interlocutory appeal prejudiced its chances of ever obtaining review of the ruling that section 647(c) is unconstitutional. However, this argument does not prove that the district court abused its discretion. At the time the court denied the motion, it could not have anticipated that the City would enter into a settlement that would preclude a review of the ruling.

The State also argues that it had standing to participate in the Rule 60(b) motion to vacate the consent judgment. The State intervened under 28 U.S.C. § 2403(b) which gave it all the rights of a party "to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." The

State did not seek to intervene under Rule 24 of the Federal Rules of Civil Procure.

The district court held that "under the terms of the statute through which the State intervened, the State has no standing either to join with the city's motion or present its own motion for vacation of the judgment." ***Blair II***, 795 F.Supp. at 318. It explained that "[t]he proceeding currently before this Court has nothing to do with the constitutionality of § 647(c). Any argument from the State concerning Rule 60(b) is vastly beyond the scope of its 'limited' right to address the constitutionality of § 647(c)." *Id.* We review this ruling de novo. *See Yniguez v. Arizona*, 939 F.2d 727, 730 (9th Cir. 1991).

The district court properly held that the motion to vacate the consent judgment had nothing to do with "facts and law relating to the question of [the] constitutionality" of section 647(c). 28 U.S.C. § 2403(b). Though we understand the State's argument that it had an interest in vacating the consent judgment so that it could obtain review of the constitutionality of section 647(c), 28 U.S.C. § 2403(b) does not allow a State standing to participate in a motion where questions of constitutionality are not among the issues argued.

AFFIRMED in part, **DISMISSED** in part, and **REMANDED** to the district court for consideration of whether to vacate it declaratory judgment.

GARTH, *Circuit Judge,* dissenting:

Although I concur with much of majority's

decision,[1/] I do not agree that we are constrained by *Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982), to remand this case to the district court for it to determine in the first instance whether its constitutional determination should be vacated. Rather, I believe that the procedural context of the present litigation is governed by *United States v. Munsingwear*, 340 U.S. 36 (1950) and therefore is completely distinguishable from the typical *Ringsby* case, which becomes moot pending appeal as the result of a settlement agreement. Therefore, *Ringsby* is inapposite. Consequently, I would dispose of the city's appeal not by returning the proceeding to the district court for its further consideration. Rather, I would dispose of the City's appeal not by returning the proceeding to the district court for its further consideration. Rather, I would impose of the City's appeal by vacating so much of the district court's judgment as declared California Penal Code § 647(c) unconstitutional, and remand to the district court with instructions to dismiss Blair's complaint, as *Munsingwear* requires. 340 U.S. at 39-40. Because the majority has declined to do so, I dissent.

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1. In particular, I agree with the majority that (1) the district court did not abuse its discretion in denying the city's Rule 60(b) motion to vacate or modify the consent judgment; (2) Blair was precluded by the terms of the consent judgment from appealing the district court's grant of summary judgment on Blair's state constitutional claims; (3) the district court did not abuse its discretion in refusing to certify the constitutional question for interlocutory appeal pursuant to Rule 54(b); and (4) the State of California lacked standing to participate in the Rule 60(b) proceedings.

I

I will assume for purposes of this discussion that the majority is correct in concluding that we lack jurisdiction to consider the City's appeal. We are faced then with the question of whether the district court's constitutional determination should be given *res judicata* or collateral estoppel effect where the City's appeal has been rendered moot as the result of the district court's entry of a consent judgment.

A

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the United States had alleged price-fixing violations against Munsingwear and sued on two counts (1) for an injunction, and (2) for treble damages. By agreement,t he second count was held in abeyance pending trial of the suit for an injunction. The district court ultimately dismissed the complaint, holding the Munsingwear's prices complied with the regulation. The United States appealed but, while its appeal was pending, the commodity involved was decontrolled. Thereafter, the Court of Appeals dismissed the government's appeal as moot.

Munsingwear then moved to dismiss the treble damages action on the basis of *res judicata*. The district court granted the motion and the Court of Appeals affirmed. On appeal to the Supreme Court, the government argued that mootness, and the deprivation of its right to appeal, warranted an exception to the rule of res judicata. The Court, however, refused to adopt such an exception:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.
>
> . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 39-40. Because the government had failed to move to vacate the district court's judgment and, thus, had failed to "avail itself of the remedy it had to preserve its rights," the Court accorded the district court's judgment full *res judicata* effect and affirmed the dismissal of the treble damages action.

Munsingwear however has come to stand for the proposition that when an appeal has been rendered moot, it is "the duty of the appellate court" to vacate the lower court judgment so as to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40, 41, *quoting Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936). Here, of course, unless the instant judgment is vacated, the legal consequences of that judgment, which holds § 647(c) unconstitutional, will continue. This is the very result

which *Munsingwear* decried and which the *Munsingwear* rule was designed to cure.

It is true that we have refused to apply *Munsingwear* rule in every case where the appeal has become moot. In *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), Ringsby had appealed from an unfavorable district court order. While its appeal was pending, the parties notified the Court of Appeals that they had settled their differences and asked us to vacate the district court's judgment.

We did not accept the parties' invitations. Noting that the district court's judgment would have been given collateral estoppel effect if Ringsby had failed to take an appeal in the first instance, we asked: "Should the situation be different where [an] appellant takes the appeal and subsequently dismisses it or by settlement secures its dismissal?" *Id.* at 722. We answered our rhetorical question with a resounding "maybe." We held that where an "appellant has by his own act caused the dismissal of the appeal and [where he, therefore, is in no position to complain that his right of review of an adverse lower court judgment has been lost," the district court should make the initial determination as to whether its judgment should be given preclusive effect, based on a balancing of "the competing values of finality of judgment and right to relitigation of unreviewed disputes." *Id.*[2/]

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2. We consistently have applied the *Ringsby* rule to cases which are settled while pending on appeal. See *Continental Cas. Co. v. Fibreboard Corp.*, 4 F.3d 777, 779 (9th Cir. 1993); *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1112-13 (9th Cir. 1990); *Allard v. DeLorean*, 884 F.2d 464, 466-67 (9th

In contrast, it is well established that a litigant, under certain circumstances, may preserve his right to appeal from a consent judgment, despite the fact that he has, in essence, settled the case. That is although "[g]enrally, a party cannot appeal a judgment entered with its consent," *Tapper v. Commissioner*, 766 F.2d 401, 403 (9th Cir. 1985), we have recognized three exceptions to this rule: (1) where the party did not actually consent; (2) where the district court lacked subject matter jurisdiction to enter the judgment; and (3) where the party preserved the right to appeal. *Id.*; *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986).

Whether any one of these exceptions is applicable in the present case -- and the City argues that all three exceptions do apply -- is less important than simple fact that the consent judgment doctrine, and its exceptions, exist at all, for it is the availability of review from a district court consent judgment which distinguishes a "consent judgment" settlement from a "settlement pending appeal." Quite simply, this is not a case in which the appellant has "caused" his appeal to be mooted in order to "destroy the collateral consequences of an adverse judgment." Rather, here the City consented to final judgment in the district court with the intent to pursue an appeal of the disputed constitutional issues as the record reveals.[3/]

Cir. 1989).

3. The majority in describing the circumstances revealed by the record recites: "the City and State wanted to obtain review of the declaration that the section 647(c) was facially

Clearly, the City's appeal has been mooted by a quirk, i.e, the fact that Blair, while once homeless, is now fully employed and unlikely ever again to be prosecuted under § 647(c).[4/] That is the reason that the settlement

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unconstitutional." Maj. Op. typescript at 13215. The city unsuccessfully moved the district court to direct the entry of judgment under Fed.R.Civ. P.54(b) after the declaratory judgment claim was adjudicated. *Id.* Without accepting or rejecting Blair's settlement offer, the City agreed to permit a judgment "in accordance with the Court's Opinion and Order." *Id.* at 13215. At the district court hearing regarding the offer of judgment, the issue of appeal arose and "the City stated that it believed it could appeal the declaratory judgment; Blair disagreed." *Id.* At the subsequent hearing on the Rule 60(b) motion, the City again sought to perfect its right to appeal. "It argued that there was a misunderstanding and mistake in the formation of the agreement; Blair believed that the judgment would preclude an appeal, while the City thought an appeal was allowed." *Id.* at 13216.

4. In *Harrison Western Corp. v. United States*, 792 F.2d 1391 (9th Cir. 1986), we refused to apply the *Ringsby* rule where actions by Harrison the prevailing party, had caused the government's appeal to become moot. We noted:

> Insofar as the prevailing party causes an appeal to become moot, preservation of the district court judgment is problematic. By leaving that judgment in place, the appellate court may allow the prevailing party to preclude an appeal while retaining the collateral effects of its trial curt victory. The appellate court ought to be particularly wary where, as here, it is the prevailing party that moves for dismissal, and the losing party that opposes the motion.

Id. at 1394 n.2 (vacating the district court's judgment and remanding with instructions to dismiss). We expounded upon this point in *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 767-68 (9th Cir. 1989), emphasizing that, in *Harrison Western*, there had not been a *Ringsby*-type settlement. Rather, in *Harrison Western*:

> The government opposed the motion to dismiss and desired to pursue its appeal against Harrison.

of Blair's damages claim had the collateral consequence of mooting Blair's equitable claim -- a claim Blair would not have been permitted to assert where it not for his now-settled damages claim. *See Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987).

In contrast to the situation *Ringsby*, where it was the appellant who would have received a windfall had we automatically vacated the district court's judgment, here it is Blair, the appellee, who will receive such a windfall -- i.e., the invalidation of § 647(c) -- if we do not vacate the district court's constitutional determination.

II

I do not believe that Blair should be permitted to enjoin the City from enforcing a statute which he lacked

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> . . . The application of federal common law and the bidding process, not the agreement of the parties to stop fighting, caused the case against Harrison to become "unreviewable." Thus, it was appropriate to apply the *Munsingwear* rule and not the *Ringsby* rule.

Id. at 767.

As mentioned, in the present case, there was no "agreement of the parties to stop the fighting." To the contrary, the City very much wants to pursue its appeal of the district court's constitutional determination. It is precluded from doing so by the fact that Blair has settled his damages claim -- the only claim which he had independent standing to assert -- and, thus, mooted the constitutional issue. It is Blair, the prevailing party, who now asks us to dismiss the City's appeal, yet to preserve for him the benefit of the district court's underlying constitutional determination. *Harrison Western* cautions us to be "wary" of such a request under the present circumstances.

standing to attack in the first place, simply because he settled his claim for damages against the City. By doing so, as the majority holds, he thereby mooted the City's appeal of the constitutional issue and precluded our review. This is not however, as the majority asserts, a *Ringsby* case. Rather, it is a pure and simple *Munsingwear* case which requires us to vacate the judgment below and remand to the district court with instructions to dismiss. Accordingly, the district court's order declaring § 647(c) unconstitutional properly should be vacated pursuant to the duty that the Supreme Court imposed upon us -- a duty which was not imposed upon the district court. *Munsingwear*, 340 U.S. at 39-40.

Because the majority holds otherwise, I respectfully dissent.

APPENDIX B

BEST AVAILABLE COPY

FILED DECEMBER 28, 1994
Cathy Catterosn, Clerk
U.S. Court of Apeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CELESTUS BLAIR, Jr.,

Plaintiff-Appellee,

v.

STEVEN SHANAHAN; JAMES LASSUS; STEPHEN PAULSON; FRANK JORDON; City of San Francisco,

Defendants-Appellants,

and

PEOPLE OF THE STATE OF CALIFORNIA,

Intervenor.

No. 92-15447
D.C. No.
CV 89-04176 WHO

OPINION

CELESTUS BLAIR, Jr.,

Plaintiff-Appellee,

v. No. 92-15450

STEVEN SHANAHAN;
JAMES LASSUS;
STEPHEN PAULSON;
FRANK JORDON; City
of San Francisco,

Defendants-Appellants,

and

PEOPLE OF THE STATE OF
CALIFORNIA,

Intervenor.

CELESTUS BLAIR, Jr.,
Plaintiff-Appellant,
Cross-Appellee

v. No. 92-15451

STEVEN SHANAHAN;
JAMES LASSUS;
STEPHEN PAULSON;
FRANK JORDON; City
of San Francisco,
Defendants-Appellees
Cross-Appellants
and

PEOPLE OF THE STATE OF
CALIFORNIA,
Intervenor-Appellee-
Cross-Appellant.

ORDER

Before: WALLACE, Chief Judge, GARTH* and WIGGINS, Circuit Judges

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the

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*Honorable Leonard I. Garth, United States District Circuit Judge, Third Circuit Court of Appeals, sitting by designation.

suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b)

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

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Celestus BLAIR, Jr., Plaintiff,

v.

Steven SHANAHAN, individually and in his official capacity, James Lassus, individually and in his official capacity, Christopher Breen, individually and in his official capacity, Jeffrey Levin, individually and in his official capacity, Frank Jordan, individually and in his official capacity, and The City and County of San Francisco, Defendants.

No. C-89-4176 WHO.

United States District Court,
N.D. California.

March 12, 1992

OPINION AND ORDER

ORRICK, District Judge.

Plaintiff, Celestus Blair, Jr. ("Blair"), is a former

panhandler.[1/] He brought this suit challenging the constitutionality of § 647(c) of the California Penal Code[2/] and enforcement of this statute by defendants under the United States and California Constitutions. On September 24, 1991, this Court issued an Opinion and Order ("Opinion") declaring § 647(c) facially unconstitutional under the federal constitution. *Blair v. Shanahan*, 775 F.Supp. 1315 (N.D.Cal. 1991). Under that Opinion, several remaining issues were reserved for resolution by trial or settlement of the parties. On December 6, 1991, defendant City and County of San Francisco (the "City") made an offer of judgment under Rule 68[3/] of the Federal Rules of Civil Procedure that

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1. "Panhandler," derived from the extended forearm of a beggar resembling a pan handle, is defined by Webster's Third New International Unabridged Dictionary as "one that panhandles" and "an able-bodied street beggar." The verb "panhandle" is defined by Webster's as "to stop people on the street and ask for money often telling a hard-luck story," "to accost on the street and beg from," and "to get (as money) by panhandling." Webster's Third New International Unabridged Dictionary 1630 (1971).

2. That statute provides in relevant part that any one "[w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" is guilty of a misdemeanor. Cal. Penal Code § 647(c)

3. Rule 68 of the Federal Rules of Civil Procedure provides in pertinent part:

> a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . to the effect specified in the offer. . . . If . . . the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance . . . and thereupon the clerk shall enter judgment. An offer not accepted shall be

was unconditionally accepted by Blair on December 10, 1991. On January 2, 1992, judgment was entered in this case pursuant to the Rule 68 offer of judgment. In the motion presently before this Court, the City moves under Rule 60(b) of the Federal Rules of Civil Procedure to modify or vacate that judgment. The Court denies the City's motion because it finds that: (1) the accepted offer of judgment represents a meeting of the minds of the parties; (2) there was no mistake in the accepted offer of judgment justifying intervention under Rule 60(b); and (3) equitable considerations do not require alteration of the judgment. In addition, the Court rejects the attempted intervention in this motion by the State of California (the "State") because the State does not have standing to argue any of the issues currently before this Court.

I.

A brief history of events after issuance of the Court's Opinion declaring § 647(c) unconstitutional is helpful. The City moved for an order under Rule 54(b) of the Federal Rules of Civil Procedure certifying the Opinion for appeal. On October 23, 1991, the Court denied that motion to avoid piecemeal appeals. In a letter dated October 10, 1991, Blair presented a settlement offer to the City. The relevant terms of this offer are summarized as follows:

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deemed withdrawn. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

1. The City would stipulate to 42 U.S.C. § 1983 liability concerning Fourth Amendment violations for arrests without probable cause;

2. The City would stipulate to 42 U.S.C. § 1983 liability for First Amendment violations involving Blair's arrests. "The stipulation could provide expressly that the City's rights to seek appellate review of the court's determination that § 647(c) violates the First Amendment are not impaired by this stipulation."

3. The City would stipulate to 42 U.S.C. § 1983 liability for Fourteenth Amendment violations. Again, appeal rights could be expressly reserved in the stipulation.

4. The City would stipulate to liability for arrests in violation of the California Constitution.

5. The City would stipulate to damages of $20,000 and to Blair's status as the "prevailing party" (entitling Blair to costs and attorney's fees).

6. The City and State would stipulate to expungement of Blair's arrests under § 647(c)

7. The City would approve, in form only, a judgment declaring § 647(c) unconstitutional on its face. The stipulation could provide expressly for the City's right to seek appellate review of that determination.

8. Blair would dismiss with prejudice all state and federal claims against all individual defendants.

9. Blair would approve in form only a judgment dismissing his freedom of speech claim under the California Constitution. The stipulation would expressly provide for Blair's right to seek appellate review of that judgment.

Decl. of Michael C. Hallerud ("Hallerud Decl."), filed Jan. 17, 1992, Ex. A. The City never accepted or rejected this offer. On November 29, 1991, Blair requested a mandatory settlement conference, which was scheduled by this Court for December 11, 1991, before Magistrate Judge Claudia Wilken.

After further settlement discussions, on December 4, 1991, George Riley ("Riley"), attorney for the City, spoke with Michael Hallerud ("Hallerud"), Blair's attorney, concerning basic terms of a "settlement framework" for which Riley would attempt to gain approval from the City's Police Commission. In a letter to Blair, Hallerud memorialized this "settlement framework."[4/] The

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4. The relevant terms of the "settlement framework" are summarized as follows:

1. The City will expunge the arrests.

2. Blair will dismiss claims arising from his February 10, 1989, arrest and dismiss all individual defendants.

3. The City will stipulate to liability under California law and 42 U.S.C. § 1983 for arrests without probable cause.

"settlement framework" never matured into an offer from one party to the other. It simply served as a framework for discussion of possible terms. Thus, the City never accepted or rejected Blair's offer of October 10, 1991, the only formal offer of settlement. The City did not counteroffer until December 6, 1991.

On December 6, 1991, the City sent Blair an offer of judgment under Rule 68. This offer of judgment provides as follows:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendants make the following offer of judgment. Defendant City and County of San Francisco ("City") offers to allow judgment to be taken against it on plaintiff's first, second, third and seventh claims for relief with respect to plaintiff's arrests on November 25 and 30, 1988, and May 20 and June 16, 1989. Defendant City further offers to allow judgment to be taken against it for damages in the total amount of $4,000.

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4. The City will stipulate to *Monell* liability for First Amendment violations. "I understand that this stipulation would preserve the City's right to appeal Judge Orrick's declaratory judgment that § 657(c) [*sic*] facially violates the First Amendment. While not discussed, I presume Mr. Riley understands that you would retain your right to cross-appeal on the corresponding free speech issues under the California constitution."

5. Attorneys' fees would be deferred to the conclusion of the litigation;

6. Damages would be $4,000.

> Defendant City also offers to allow judgment to be taken against it regarding plaintiff's request for an order expunging all records relating to plaintiff's detentions, arrests, and searches on each occasion set forth in the First Amended Complaint. Finally, the City offers to allow judgment to be taken against it on the ninth claim for relief in accordance with the Court's Opinion and Order filed September 24, 1991.
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> The effect of plaintiff's acceptance of this offer will be an entry of judgment under Rule 54 of the Federal Rules of Civil Procedure (1) granting the relief set forth above, (2) [dismissing] the remaining causes of action and (3) dismissing with prejudice all defendants other than the City.
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> This offer of judgment does not cover any attorneys' fees and costs incurred to date to which plaintiff may be entitled. The issue of attorneys' fees and costs shall be resolved in a separate proceeding through a petition to the Court.

Hallerud Decl., Ex. F. The offer of judgment was unconditionally accepted by Blair on December 10, 1991.

As is clear from the text of the offer, the Rule 68 offer is substantially different from Blair's settlement offer. Primarily, unlike Blair's offer, the Rule 68 offer is silent as to appeal rights.[5/] In addition, the damages to be

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5. Likewise, the unconditional acceptance of this offer from Blair is silent as to appeal rights. The acceptance reads as follows:

> On behalf of our client, Celestus Blair, Jr., we hereby give you written notice that Mr. Blair accepts

awarded Blair are drastically reduced, and Blair's appeal rights as to the constitutionality of the statute under the California Constitution are foreclosed, because that claim is dismissed with prejudice under the Rule 68 offer. This offer, as a Rule 68 offer of judgment rather than a simple settlement counteroffer, also carries with it the specific threat of dramatic cost shifting if Blair had rejected it and subsequently won a less favorable judgment (see discussion below in section II.C.).

These substantial differences indicate to the Court that the Rule 68 offer was not a simple counterproposal made in furtherance of good-faith negotiation. Rather, the Rule 68 offer was qualitatively different from Blair's settlement offer.

At a hearing on January 2, 1991, the Court expressed uncertainty on two grounds as to the settlement at which the parties had arrived. The first was a misplaced word; the offer of judgment used "denying" when "dismissing" was intended. This mistake was clarified at the hearing and amended by the Court with the parties' agreement. The second had to do with the appealability, if any, of a judgment entered pursuant to the accepted offer of judgment. When questioned on this issue, the City's attorney asserted that "it is still a live controversy as long as the City doesn't satisfy the judgment. . . . and we researched this area, and I agree it is a very murky area --." RT, Jan. 2, 1991, at 6:16-19. Blair's attorneys then

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unconditionally the offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure that you made on behalf of defendants in your letter dated December 6, 1991. . . .

indicated that they believed no appeal would lie from the offer of judgment. The Court subsequently entered the judgment.[6/] The City now moves to vacate or modify the judgment entered pursuant to its Rule 68 offer of judgment.

II

The City makes several arguments in seeking to vacate or modify the Rule 68 offer of judgment. All of these arguments fail. First, the City argues that the offer of judgment does not preclude an appeal. This argument will not be explored because it is properly addressed to the Ninth Circuit and not to this Court. Second, the City presents two factually related but conceptually distinct arguments. It argues on one hand that the Rule 68 offer should be analyzed under standard contract law canons. Under contractual analysis, the City asserts that Blair's belief that acceptance of the offer of judgment bars an appeal was a "misunderstanding" that precluded the possibility of a "meeting of the minds," and no valid contract was created. The related argument the City presents is that under Rule 60(b) of the Federal Rules of Civil Procedure, the offer should be vacated or modified

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6. In addition, on January 2, 1992, the Court signed and filed a Stipulation and Order extending time for Blair to file a cost bill or an application for attorneys' fees "[b]ecause an appeal may be filed. . . ." Stip. and Order Extending Time for Pl. to File a Cost Bill or An Application for Attorneys' Fees at 2. The Court signed and filed a second Stipulation and Order on January 2, 1992, expunging all records regarding the arrests set forth in Blair's first amended complaint.

due to mistake.[7/] The City argues that because the parties were mistaken as to each other's understanding of the legal result of the judgment, the Court may vacate or modify the judgment as necessary to effectuate the actual intent of the parties. It also argues on various grounds that equity requires the Court to vacate the judgment so that the City's appeal will not be jeopardized by a procedural miscue.

As a final issue, the State attempts to intervene to request that the judgment be modified so that the State would be able to appeal the judgment. The Court rejects the State's argument because the State does not have standing to argue the issues currently before the Court.

A.

As to the first argument, that no contract was formed because there was no "meeting of the minds," the City relies on *Callie v. Near*, 829 F.2d 888 (9th Cir. 1987). *Callie* merely held that "[w]here material facts concerning the *existence* or *terms* of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing." *Id.* at 890. In that case, no signed agreement was ever entered into between the parties. Appellant's lawyer sent a letter proposing certain terms of settlement and respondent's lawyer sent a reply letter with similar but different terms. No party ever signed the other's letter.

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7. Rule 60(b) provides in pertinent part that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect. . . ."

Thus, *Callie* involved, in part, a dispute as to the actual *existence* of the settlement contract. Here, in contrast, we have a clear and unambiguous contract formally offered and unconditionally accepted.

The City further argues that the terms of the contract created by the Rule 68 offer were unclear and that, therefore, there was no "meeting of the minds." *Callie* also involved a dispute as to a *material term* of the alleged settlement. In that case, the theory of the defendant's liability to be settled upon was crucial in that if the settlement claimed fraud or deceit, the defendant's career in real estate syndications would be finished. Appellants there claimed that no liability theory was ever settled upon because the original letter was silent and the reply letter specifically required a finding of fraud and deceit. Because the agreement in *Callie*, if it existed, contained a contradictory resolution of an essential term, the lower court erred in not conducting an evidentiary hearing. But here we have no such uncertainty as to the terms of the agreement; the offer and acceptance are both silent as to appeal rights. *Callie* is inapposite.[8/]

The City urges the Court to find a misunderstanding as to the right to appeal between the parties in the terms of this Rule 68 offer. It argues that the offer created uncertainty on two grounds. First, the

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8. In any event, given the dispute as to whether or not the settlement even existed and given the dispute as to a material term of any such settlement, the *Callie* court remanded the case for an evidentiary hearing to determine the proper resolution of those disputes. Thus, *Callie* is even less helpful. The City does not want an evidentiary hearing, rather, it seeks vacation of the judgment. *Callie* does not support vacating the judgment.

offer syntactically separated resolution of the complaint's ninth claim (requesting the declaration of facial unconstitutionality) from the other claims. Second, the City's offer makes reference to Rule 54 of the Federal Rules of Civil Procedure. Together, the City then argues that these elements of the offer indicate the City's intent to preserve for appeal this Court's declaration as to the constitutionality of § 647(c).[9/] Those oblique references simply do not rise to the level of a disputed term of the contract. Whatever the subjective intent of the drafter, objectively read, the Rule 68 offer is silent as to appeal rights. Therefore, there was no misunderstanding as to any material term of the Rule 68 offer.[10/]

The City claims that "the parties attached entirely different meanings to the Rule 68 offer and that there was no meeting of the minds." City's Reply Br. ("City's Br."), filed Jan. 24, 1992, at 16, 11. 26-27. That statement is simply wrong. The parties currently reach different conclusions as to whether or not an appeal lies from entry of that judgment (an issue upon which the contract is completely silent). The disagreement concerns the legal effect of this contract, concerning an issue upon which the offer was silent. There is no dispute concerning a term present in the contract itself. Appeal, although a critical issue in settlement discussions, was not a material term of the Rule 68 offer. In the contract that was offered and accepted, there was a meeting of the minds as to every

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9. Again, whether such references, in fact, entitle the City to an appeal is a question for the Ninth Circuit.

10. The offer simply leaves each party open to the possibility that its evaluation of whether an appeal lies will be mistaken.

material term.

In *Erdman v. Cochise County, Arizona*, 926 F.2d 877 (9th Cir. 1991), the Ninth Circuit reversed the lower court's decision to rescind an accepted Rule 68 offer of judgment. In that case, the offeror failed "to recognize that 'costs' in actions under 42 U.S.C. § 1988." *Id.* at 879. Thus, the offeror was obliged to pay a substantially larger award than anticipated. The defendant sought rescission due to the unartful drafting the offer. The *Erdman* court rejected such logic. It held, "'it would be ludicrous and manifestly unjust to allow defendants to argue after the fact that their offer really means more than it says.'" *Id.* at 880 (quoting *Rateree v. Rockett*, 668 F.Supp. 1155, 1159 (N.D.Ill. 1987)). *Erdman* governs the case at bar.

B.

The City's second argument, that due to mistake the judgment should be vacated under Rule 60(b), fails as well.[11/] In arguing that the judgment be vacated under Rule 60(b)(1), the City relies principally upon *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983), and *Whitaker v. Associated Credit Services, Inc.* 946 F.2d 1222 (6th Cir.

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11. As a preliminary issue, the Court notes that this argument is undercut by the City's claim that it both can and does intend to appeal from the judgment. The City argues generally that it intends to appeal the offer of judgment, and that it *can do so.* Mem. of P. & A. in Supp. of Mot., filed Jan. 9, 1992, at 6-9. Obviously, whether the cases the City relies on do or do not support its position is a question for the Ninth Circuit and not for this Court. If that is the City's true position, however, then either there is no mistake, or at worst, only plaintiff is mistaken.

1991).[12/] The City relies on *Rodgers* for the proposition that "'the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with technical procedural problems.'" *Rodgers*, 722 F.2d at 459 (quoting *Staren v. American Nat'l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976)). Although that quotation is accurate, *Rodgers* also explains that "there is a compelling interest in the finality of judgments which should not lightly be disregarded." *Id.* There has been a resolution of the central issues of this case on the merits after vigorous and thorough briefing. Pursuant to such resolution, a final judgment has been entered in accordance with the agreement of the parties. Thus, *Rodgers* does not support the City's argument.

Whitaker involved a mistake in transcription of the dollar amount of a judgment. A Rule 68 offer of judgment was made and accepted providing for damages of $500,000 where $500 was intended. *Whitaker* distinguished *Brown v. County of Genesee*, 872 F.2d 169 (6th Cir. 1989), and *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991), both of which espoused the Sixth Circuit rule that *mistake must be mutual* for Rule 60(b) to provide relief. *Id.* at 1280. In distinguishing *Brown* and *Mallory*,

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12. Both parties agree that motions under Rule 60(b) are addressed to the sound discretion of the trial judge. *Thompson v. Housing Authority of Los Angeles*. 782 f.2D 829, 832 (9th Cir.), *cert. denied*, 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986). The City argues that Rule 60(b) should be applied liberally, and Blair argues that Rule 60(b) requires a showing of exceptional circumstances to alter a judgment. These arguments are irrelevant. The question before this Court is whether a mistake was made that warrants a modification under Rule 60(b)(1).

the *Whitaker* court emphasized that "the mistake was simply a typographical error. To mechanically label the typographical error as a unilateral mistake of the kind in *Brown* would be to ignore justice in favor of pure terminology." 946 F.2d at 1225. The Sixth Circuit explained that the district court did not abuse its discretion in vacating that judgment because "this mistake is just too big to ignore." *Id.* at 1225. In addition, *plaintiff's* attorney viewed the offer as "outrageous" and was "shocked" to receive it. *Id.*

The City now fears that the ultimate legal result of its having made this offer, silent on appeal rights, may be different than it had anticipated. It asks this Court to vacate that judgment. None of the facts relied on by the *Whitaker* court in distinguishing *Brown* and *Mallory*, however, are present here. In this case, the Rule 68 offer contained no typographical error.[13/] In addition, under Sixth Circuit law applied in *Whitaker*, mistake as to the terms of a settlement agreement must be mutual. *Mallory*, 922 F.2d at 1280. Here, even assuming that a mistake as to an issue upon which the contract is entirely silent would justify invocation of Rule 60(b)(1), the mistake could not have been mutual. Either an appeal lies or it does not. In either event, only one party will be mistaken as to that issue.

Most important, the "mistake" in *Whitaker* was on the face of the settlement offer and was a material term of that offer. Here, the mistake, if any there was,

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13. Indeed, a mistake of the type contemplated by *Whitaker* was corrected by the Court when the word "dismissing" was substituted for "denying" with the parties' agreement.

concerns the legal effect of the agreement regarding an issue upon which the offer is silent. The mistake does not concern *the terms* of the agreement itself. Although both parties were concerned with appeal rights in the settlement negotiations, the City failed to mention that issue in the Rule 68 offer.[14/] Appeal rights are simply not terms of the offer; there is no mistake as to appeal rights in the offer. Moreover, even assuming that the Rule 68 offer's silence on appeal issues rises to an "ambiguity," it is well established that in settlement offers "ambiguities are construed against the drafter." *Erdman*, 926 F.2d at 880.

In "murky" areas of the law, the parties properly bear the risk of entering into agreements that are silent on crucial issues. Imagine a contrary rule: A Rule 68 offer, duly accepted, may be vacated at the offeror's whim when the offeror's research reveals that the probable legal result of a judgment entered pursuant to that offer, concerning an issue *upon which the offer was silent*, is unfavorable. Such a policy would be absurd.

C.

The final argument presented by the City is that for various reasons equity requires that the Court exercise its discretion to vacate the judgment. The City asks that its

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14. The City also cites to *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 645 (9th Cir. 1984), for the proposition that "[m]istake of counsel induced by error of law is covered by Rule 60(b)(1). . . ." Although this quotation is accurate, it was irrelevant to the disposition of that case. That case hardly supports the general rule the City claims it represents.

right to appeal the important constitutional issues raised by this case not be foreclosed due to a technical oversight. This is the City's strongest argument. It is not clear, however, that the City deserves the equitable treatment it seeks. The settlement history demonstrates that the City never responded to Blair's offer. Instead, for tactical reasons, the City presented its Rule 68 offer of judgment. This offer contained sharply different terms and was silent as to appeal.

Further, the Rule 68 offer is not a neutral settlement offer in furtherance of open negotiations. Rather, such an offer "presents a more draconian choice to the plaintiff," in that should the plaintiff refuse the offer and ultimately receive a less favorable judgment, the plaintiff must bear all of its and the defendant's costs incurred after the offer was made. *Said v. Virginia Commonwealth University/Medical College*, 130 F.R.D. 60, 63 (E.D.Va.1990). A Rule 68 offer forces the plaintiff to "think very hard" and settle or face the prospect of incurring great costs. *Marek v. Chesney*, 473 U.S. 1, 11, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985). The offer was made intending to force Blair's hand. The City cannot now complain because it was successful in its efforts.

Rule 68 is a powerful tool. It can be used by defendants to make an offer which, if refused, may be used against the plaintiff later. This Court should not add to that power by allowing an offer that had been accepted to be revised to reflect post-acceptance changes in the offeror's legal analysis concerning an issue upon which the offer was silent. Objectively, the offer is silent as to rights of appeal. It is not the role of the Court to abrogate contracts entered into by parties pursuant to Rule 68

when the offeror deems the contract inexpedient or unwise. It is well established that, in settlement offers, "ambiguities are construed against the drafter." *Erdman*, at 880.[15/]

The City also argues that it should not lose its right to appeal due to mistake of counsel and that it never authorized a settlement that would not preserve its right to appeal. The City argues that the Ninth Circuit is unwilling "to deprive a party of its right to appeal because of mistakes of counsel." City's Br. at 14 at 22, 11. 27-28-23, 1.1. For this proposition the City relies on *Williams v. Boeing Co.*, 681 F.2d 615, 616 (9th Cir. 1982), and *Seidman v. Beverly Hills*, 785 F.2d 1447 (9th Cir. 1986). *Williams*, however, involved the reinstatement of a party's mistaken voluntary dismissal of an appeal of a Rule 54(b) judgment. The court stated that "[w]e do not condone the lack of understanding of appellate procedure demonstrated by appellant's counsel, but we see no reason to let counsel's failure *in this case* work to his client's detriment." 681 F.2d at 616 (emphasis added). *Williams* is entirely distinguishable from the facts at bar. Here, counsel's failure, if any there be, should work to the City's detriment; this case involves a Rule 68 offer of judgment knowingly entered into by the parties. Indeed, the City frequently uses a Rule 68 offer to limit its costs in litigation. Decl. of Louis Giraudo, filed Jan. 9, 1992, at 2. The legal risks of such a strategy are to be borne by the

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15. Nor is it the role of this Court to presume that the judgment is not appealable and thereby offer a prospective judgment as to the legal result of the contract entered into by the litigants.

parties. Moreover, the *Williams* case involved a mistaken dismissal. An inadvertent dismissal is vastly different from an accepted Rule 68 offer that is silent as to appeal.

Nor is the *Seidman* helpful to the City. In a footnote, the *Seidman* court noted that the "dismissal of this appeal is without prejudice to Seidman's seeking relief before the district court from the judgment of voluntary dismissal with prejudice for reasons of 'mistake, inadvertence, surprise, or excusable neglect' under Federal Rule of Civil Procedure 60(b)(1)." 785 F.2d at 1448 n. 3. This footnote does not give the Court guidance. Seeking modification under Rule 60(b) is , of course, a party's right. Here, however, we deal with whether or not such a motion should be granted. This Court's grant of such a motion must be in conformance with the law.

In addition, the City argues that it would never have authorized approval of a settlement that did not provide for an appeal of the constitutional issues raised by the Opinion. The offer, however, was formally authorized by the City. Riley had real and apparent authority to submit the Rule 68 offer and enter into the judgment. Decl. of George A. Riley, filed Jan. 9, 1992, at 6; Decl. of Pius Lee, filed Jan. 9, 1992, at 2; Decl. of Edward Campana, filed Jan. 9, 1992, at 2. The City's reliance on *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143 (9th Cir. 1977), is misplaced. In that case, the court noted that, "[i]f the record had shown that the plaintiffs had agreed to the settlement, or that the attorneys had authority to settle the suit and dismiss the action, the district court would then have acted well within its discretion in denying the [60(b)] motion." *Id.* at 1144. Here, the City agreed to propose the offer and its attorney had the authority to

present the offer. The City's sole grounds to argue that Riley did not have authority to submit the offer is that the City now hopes for a more favorable result than that for which it bargained. This argument cannot be accepted.

Finally, the City argues that refusing to modify the judgment will create uncertainty in the law.[16] This argument is specious. The declaration of unconstitutionality stands as law. The City claims this situation creates uncertainty because "[t]o obtain an appellate review of this Court's ruling, the official must 'flout' this Court's declaration by initiating an arrest or prosecution under § 647(c)." City's Reply Br. at 22-23. The City argues that officials should not have to incur this risk. Likewise, the City argues that would-be beggars face the risk of erratic enforcement of the statute. The short answer to this argument is that § 647(c) is unconstitutional.[17] While the Ninth Circuit might reverse that judgment, no Ninth Circuit decision is presently necessary to clarify issues for the City or would-be beggars. Any attempt to enforce that statute would flout this Court's order. Beggars may solicit alms without

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16. Again, contrary to its assertions that the judgment can be appealed, this argument presumes that absent modification, the judgment may not be appealed.

17. A longer answer is that the City mistakenly presumes that, where a party hopes to appeal, no determination by a district court is final unless reviewed by an appellate court. Appeal, however, is not an inalienable right. A party is entitled to appeal only in accordance with the law, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure. If a judgment is entered from which no appeal lies under the law and the relevant procedural rules, no uncertainty is created. Rather such a case is concluded, and the judgment stands as law.

fear of punishment under that statute. As it stands, there is no uncertainty. If no appeal lies from the judgment, the City has lost the case on that issue. If an appeal lies, the Ninth Circuit will determine the constitutionality of § 647(c).

III.

The State has intervened in this case pursuant to 28 U.S.C. § 2403(b). The State also moves to vacate the judgment entered pursuant to the City's Rule 68 offer of judgment.

The State argues that intervenors under 28 U.S.C. § 2403(b) intervene with "all the rights of a party." Because the State intended to appeal the determination that § 647(c) was facially unconstitutional, it argues that it should be guaranteed that right as a party. The State does not have standing to assert that right.

A.

A threshold question to this argument is whether or not the state has standing to pursue this motion. Section 2403(b) provides in pertinent part that:

> In any action, suit or proceeding in a court of the United States to which a state . . . is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question, the court shall . . . permit the State to intervene for presentation of evidence . . . and for

> argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs *to the extent necessary for a proper presentation of the facts and law relating to the question constitutionality.*

28 U.S.C. § 2403(b) (emphasis added). Thus, the State has all the rights of a party to the extent necessary for presentation of the facts and law concerning *the constitutionality of 647(c).* This Court has had a proper and extensive presentation of the facts and law concerning the constitutionality of 647(c). As a result of that presentation, in which the State's assistance was substantial, the Opinion issued. The motion currently before the Court has no bearing on the constitutionality of 647(c). The motion's relevance goes solely to the terms of the judgment entered pursuant to Rule 68 offer of judgment. This is not a question concerning the constitutionality of the statute, nor does this issue involve § 647(c). In short, under the terms of the statute through which the State intervened, the State has no standing to either join with the City's motion or present its own motion for vacation of the judgment.

There are few cases discussing this issue. Several cases, however, indicate that the State should not be deemed to have standing to pursue this motion. In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F.Supp. 198, 215 n. 17 (S.D. Tex. 1982), a district court explained that, "[g]iven the affirmative relief

requested by the State of Texas [an injunction against defendants], intervention under § 2403(b) is inapplicable . . . . " Here, too, the State seeks affirmative relief in vacation of the judgment entered by the actual parties. In *Ruotolo v. Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978), the First Circuit explained that there is a difference.

> between permitting the United States to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the parties have composed their differences. To do the latter, we think the government must possess some independent basis as a party apart from its status as intervenor. . . .

Finally, in *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the Ninth Circuit explained that because two parties were appealing an issue, Arizona had the "limited" right to join the appeal under § 2403(b) to "make an argument on the question of constitutionality. Before the [State] can assert any right at all three must be a viable proceeding in which that right may be asserted." *Id.* at 739. Given that the State's limited right is to make an argument concerning constitutionality, and that there must be a viable proceeding in which the State can assert that limited right, *Yniguez* strongly indicates that the State has no standing to move for vacation of the judgment entered by the actual parties. The proceeding currently before this Court has nothing to do with the constitutionality of § 647(c). Any argument from the State concerning Rule 60(b) ius vastly

beyond the scope of its "limited" right to address the constitutionality of 647(c).

Against the words of the statute, the strong implications of case law, and without citation, the State argues that "a State must be given an opportunity to intervene as a party for the purpose of litigating the constitutionality of the statute. This means that the State must have the right to seek vacation of an order that arguably could imperil the right of the State to seek an appeal. . . ." State's Reply Br., filed Jan. 24, 1992, at 6. The State's position is that without the right to pursue every procedural exercise that may impact on an ultimate determination of constitutionality, the State is limited in its ability to present evidence as constitutionality. The question presented by this argument is: How far removed from an actual proceeding determining the constitutionality of a statute, would an intervenor continue to have standing? Under the State's proposal an intervenor could unilaterally move a court to vacate a judgment properly presented and accepted by the parties. The State in such a scenario becomes much more than a party. It becomes a super party who could trump the agreement of the actual parties.

If Congress had intended such a result, it would have provided an intervenor standing under § 2403(b) to litigate *every issue* in a case involving the constitutionality of a state statute. Congress did not so provide. It specifically limited the standing of a state to "presentation of facts and law relating to the question of constitutionality." 28 U.S.C. § 2403(b). The Court finds that the State has no standing to present argument on the Rule 60(b) motion before this Court.

IV

Accordingly,

IT IS HEREBY ORDERED that:

1. The motion of the City and County of San Francisco to modify or vacate the judgment entered on January 2, 1992, in this case is DENIED.

2. The Judgment entered on January 2, 1992, pursuant to the unconditionally accepted Rule 68 offer of judgment, stands as entered.

3. The State of California, as intervenor, has no standing to argue this Rule 60(b) motion.

Supreme Court, U.S.
FILED
MAR 2 4 1995
OFFICE OF THE CLERK

No. 94-1440

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

State of California,

Petitioner,

v.

Celestus Blair, Jr.,

Respondent.

On Petition For Writ Of Certiorari

To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does 28 U.S.C. § 2403(b) provide standing to nonparty State of California to prolong an action, to which it was never a party, after the actual parties settled the case by a consent judgment that eliminated any case or controversy?

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I. JURISDICTION

The Supreme Court has jurisdiction to review decisions of the courts of appeal by writ of certiorari pursuant to 28 U.S.C. § 1254. However, this Court lacks subject matter jurisdiction over the State's petition for a writ of certiorari, because Blair's damages claim pursuant to 42 U.S.C. § 1983, which supplied the case or controversy necessary for Article III jurisdiction, was settled by a consent judgment without preserving any right of appeal. *Blair v. Shanahan*, 38 F.3d 1514, 1519-20 (1994) (App. A 26-31); *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994) (no subject matter jurisdiction to review judgments mooted on appeal).

The State presumes its standing because it participated in the District Court pursuant to 28 U.S.C. § 2403. However, section 2403 does not confer standing upon the State independent of the constitutional issues or of the case or controversy on which the action was founded. *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991); *Blair*, 38 F.3d at 1522 (App. A at 36); *see Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978) (section 2403(a) does not confer upon the United States standing to appeal where the actual parties had resolved their constitutional dispute). On those grounds, the Ninth Circuit held that the State had no standing to participate in the motion made pursuant to Federal Rule of Civil Procedure 60(b) to vacate the

consent judgment, to which the State was a stranger. *Blair*, 38 F.3d 1514, 1519-20 (1994) (App. A at 28-29).

II. STATEMENT OF THE CASE

The State of California seeks to prolong a lawsuit settled in 1991. That settlement resolved the state and federal constitutional issues, leaving only ordinary procedural issues.

Respondent Celestus Blair, Jr. had sued the City and County of San Francisco, its Police Chief, and several police officers (collectively the "City") for repeatedly arresting him, without the probable cause required by the Fourth and Fourteenth Amendments, and pursuant to a California vagrancy statute, California Penal Code § 647(c), which the District Court held was facially unconstitutional under the First and Fourteenth Amendments of the United States Constitution. Blair sought and obtained relief only from the City. Blair did not name the State as a defendant. The District Court notified the State under 28 U.S.C. § 2403(b) of the constitutional challenge to section 647(c).

The State did not then elect, and has not since elected, to intervene as a party-defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure. Instead, the State elected statutory *amicus curiae* status "[p]ursuant to 28 U.S.C. § 2403(b) . . . for the limited purpose of presenting evidence and argument on the constitutionality of Penal Code § 647(c)," representing to the District Court that "[e]xcept by this intervention, *the State is not a party to this action.*"

(State's Notice of Intervention SER 3-4); ER 19 at 1, p1 (emphasis added). The State has since repeatedly stressed the limited nature of its participation.1/

When Blair and the City cross-moved for partial summary judgment, the State filed briefs and presented oral argument supporting the constitutionality of section 647(c). *Blair v. Shanahan*, 795 F. Supp. 309, 318 (N.D. Cal. 1992) ("*Blair* II"). On September 24, 1991, the District Court issued a memorandum opinion declaring, *inter alia*, that section 647(c) was facially unconstitutional under the First and Fourteenth Amendments. *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) ("*Blair* I").

After the District Court refused to certify the declaratory judgment for interlocutory appeal, the State announced that its participation in the case was at an end: "We will retire at this point and wait for the final disposition of the case." ER No. 146, 4:17-18. The State did not participate in the subsequent settlement discussions

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1/ *E.g.*, "The State's intervention is limited to defending the facial validity of section 647(c)." Appendix filed with Blair's Motion to Dismiss State's Appeal, Tab. F. As no Supreme Court record currently exists, these factual references are to the record before the Ninth Circuit. (In this brief, "ER" represents Excerpts of Record filed by the City and "SER" represents Supplementary Excerpts of Record filed by Blair). Citations in this Brief to the Appendix ("App.") are to the Appendix to the Petition for Certiorari, unless otherwise noted.

between Blair and the City, or in the December 1991 settlement resulting from Blair's acceptance of the City's Rule 68 offer of judgment.[2/] The District Court entered judgment for Blair on January 2, 1992.

The City immediately announced its intention to appeal its Rule 68 consent judgment, but soon lost confidence in the validity of that position, and moved pursuant to Fed. R Civ. P. 60(b) to vacate the judgment it had offered on the grounds of mistake, inadvertence, surprise, or excusable neglect. The State then filed its own Rule 60(b) motion, arguing for the first time -- *after* the entry of final judgment and *after* Blair challenged the State's standing to vacate the judgment under Rule 60(b) -- that section 2403 conferred party status upon the State for some (but not all) purposes beyond the presentation of constitutional issues.[3/] Even then, however, the State did not claim Rule 24 party intervenor status, and did not move to intervene under Rule 24 for purposes of taking an appeal.

[2/] The judgment admitted *the City's* liability for Blair's Fourth Amendment claims, and also provided that judgment would taken against *the City* "in accordance with the Court's Opinion and Order" holding section 647(c) unconstitutional. *Blair II*, 795 F. Supp. at 312 (App. C at 55).

[3/] The State has never sought party status for the purpose of accepting the risk of liability.

The District Court denied the State's motion because the State did not have standing to file or argue a procedural motion to vacate a judgment to which it was not a party. *Blair II*, 795 F. Supp. at 318-319 (App. C. at 72). The Ninth Circuit affirmed, holding that section 2403 does not afford the state "standing to participate in a motion where questions of constitutionality are not among the issues argued." 38 F.3d at 1522 (App. A at 35-36). The Ninth Circuit also held that Article III jurisdiction had expired with the entry of the consent judgment granting Blair's damages claims. *Id.* at 1520 (App. A at 31).

III. SUMMARY OF THE ARGUMENT

Issuing a writ of certiorari in this action would be improvident. This action is not a vehicle for ensuring the supremacy of federal law, resolving any conflict over an unsettled issue of constitutional or statutory rights, or preserving federalism. The rulings below are merely the product of routine application of Article III's limitations and section 2403's plain language.

Section 2403 intervention is expressly available only for the limited purpose of presenting evidence and argument on the constitutional issues raised by actual litigants between whom there is a real case or controversy; a section 2403 intervenor is not made a typical party to the underlying litigation, although it has "all the rights of a party . . . *to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.*" 28 U.S.C.

§ 2403 (emphasis added); *see generally* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.06[2]. For that reason, section 2403 is not an independent grant of jurisdiction to federal courts, nor does it allow a nonparty to posit a case or controversy where actual parties have not.

The State makes no argument based upon the plain meaning of section 2403, or upon the case law applying it. The State instead argues that section 2403 must, for policy reasons, create independent standing so that states can defend the constitutionality of their statutes from "collusive or inadvertent deals" by the real parties to a case. (State's Petition at 15-16.) Contrary to the State's assertion, the State's loss of standing did not result from acts beyond the State's control or from a "collusive or inadvertent" deal. Rather, the State decided to avoid liability for enactment of a facially unconstitutional law, liability that would have resulted from full-party intervention under Rule 24(a)(2).

Rule 24(a)(2) affords states the opportunity, subject to Article III's limitations, to join actions as parties, thus acquiring all the rights and undertaking all the obligations of a party to the action. *See generally* 7C C. WRIGHT, A. MILLER & A. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1901-02 (2d 3d. 1986). Section 2403 offers the alternative of presenting evidence and argument on constitutional issues without subjecting the State to the primary risk faced by a party,

liability. Apparently attracted by this alternative, the State intervened expressly "[p]ursuant to 28 U.S.C. § 2403(b)." SER 3-4; ER 19 at 1. The State chose to ignore its opportunity to seek standing as a party defendant. The price of avoiding liability is the loss of the right to prolong litigation from which its political subdivision, the City, chose to retire.

The State's citation to *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994) is incongruous. No section 2403 intervenor was present in *Bancorp*, and the *Bancorp* opinion never refers to section 2403. *Bancorp* has absolutely nothing to do with whether a section 2403 intervenor may take an appeal after the case or controversy is resolved, or whether the State may be heard on nonconstitutional issues despite section 2403's express limitation. *Bancorp* does establishes equitable guidelines for courts to apply in considering *vacatur* motions brought by *parties* to actions that have been settled after appeals are taken. Here, in contrast, the State seeks leave to move for *vacatur* as a method of collaterally attacking a consent judgment to which the State itself chose *not* to be a party.

The State's ultimate objective, of course, is to reopen a constitutional dispute fully litigated by a subordinate entity (the City), or failing that, to attack the merits of the trial court's interlocutory opinion by *vacatur*, thus wiping off the books a decision the State dislikes. But this use of *vacatur* as a collateral attack on the merits is

expressly rejected in *Bancorp*. *Bancorp*, 115 S. Ct. at 392-93. Accordingly, the State of California's petition should be denied.

IV. ARGUMENT

A. Blair's Counter-Statement of the Question Presented for Review

Blair respectfully submits that the appropriate question presented for review by the decision of the United States Court of Appeals for the Ninth Circuit is:

> Does 28 U.S.C. § 2403(b) provide standing to nonparty State of California to prolong an action, to which it was never a party, after the actual parties settled the case by a consent judgment that eliminated any case or controversy?

The State's formulation of the question is:

> May a district court declare a state statute unconstitutional in a reported order granting declaratory judgment where non-state litigants moot the controversy and deprive the State, appearing as a government intervenor, of both an opportunity to obtain appellate review and the right to vacate the declaratory judgment?

The State's formulation is both flawed and disingenuous. The District Court did not "deprive" the State of either appellate review or the 'right' to vacate the declaratory judgment. The State participated in this litigation from the safe distance permitted by section 2403. If the State were deprived of any rights, the deprivation was a result of its deliberate decision to remain aloof and of its political subdivision's conduct of the litigation. The City determined to settle this action and forego appeal. The real issue, therefore, is neither one of federal rule interpretation nor trial court discretion. The real issue is whether the

State can establish its standing, both in the constitutional respect of whether a case or controversy still exists under Article III, and in the statutory respect of whether section 2403 authorizes limited intervention other than to present evidence and argument while a constitutional issue remains open.[4/]

B. The Plain Meaning of Section 2403 Limits Intervenors to the Presentation of Evidence and Argument on the Constitutional Issues -- Rights Fully Accorded the State in this Action

Section § 2403 affords the United States and the States the right to intervene "*for presentation of evidence . . . and for argument on the question of constitutionality*" in actions challenging their statutes on federal constitutional grounds. Section 2403(b) provides that the "State shall have all the rights of a party and be subject to all liabilities of a party as to court costs *to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.*" (Emphasis added.)

The plain meaning of the section limits an intervenor's rights to those necessary to present evidence and argument on constitutional issues, such as briefing and arguing constitutional questions, or taking

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4/ In addition, the State's question misreads *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), which does *not* provide any party to any litigation an absolute "right" to vacate any judgment, much less purporting to provide such a right to a limited intervenor under section 2403. *Id.* at 391-93.

an appeal on the issue of a statute's constitutionality. *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986) (standing to appeal the issue of constitutionality); *Vietnamese Fishermans' Ass'n. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) (scope of intervention under § 2403(b) "limited to presenting evidence and arguments in support of the constitutionality of the statute").

The State participated fully in the instant action, including by briefing and arguing the constitutional issues. *Blair II*, 795 F. Supp. at 318. When, however, the real parties entered into a consent judgment, any actual Article III case or controversy expired, along with the right of appeal. *Tapper v. Commissioner*, 766 F.2d 401, 403 (9th Cir. 1985) ("Generally, a party cannot appeal a judgment entered with its consent."); *accord Coughlin v. Regan*, 768 F.2d 468, 469-70 (1st Cir. 1985).

Because the State continuously elected not to become a party defendant, it could neither assist or resist the parties' settlement of the case. The State purported to move under Rule 60(b) to vacate the consent judgment, but the issues raised by the Rule 60(b) motions did not implicate the constitutional questions on which the State intervened under section 2403. Rather, the only issues raised by the Rule 60(b) motions were (1) whether the City could establish some mistake, inadvertence, surprise, or excusable neglect that would justify

vacating the judgment and (2) whether *vacatur* was appropriate.[2/] Because the Rule 60(b) motions focused on the nonconstitutional issues of whether the State and the City had surrendered their appellate opportunities because of their own conduct, the District Court and Ninth Circuit correctly determined that the State lacked standing to participate.

C. Certiorari is Inappropriate Because the Courts Have Uniformly Held that Standing Under Section 2403 is Limited to Participation in the Consideration of Constitutional Issues

Because the purpose and scope of section 2403 is apparent from its plain language, the few courts applying section 2403 have limited intervenors to the presentation of evidence and argument on constitutional issues. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the district court held unconstitutional Arizona's ballot initiative declaring English to be Arizona's official language. The Governor of Arizona, a party in the trial court, chose not to appeal. *Id.* at 730. Because the Ninth Circuit permitted the initiative's proponents to intervene as parties for purposes of taking an appeal, the Arizona Attorney General was also permitted to intervene in the appeal. However, the Attorney General's intervention was limited to making

> an argument on the question of constitutionality. . . . [H]e is given no right to appeal *as a party*. Before the Attorney General can assert any right at all there must be a viable proceeding in which that

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2/ *See infra* IV(E) & (F).

right may be asserted . . . . We emphasize that under § 2403(b) the Attorney General is not a party . . . . So long as there is . . . an appeal he may file a brief and participate in the oral argument.

Id. at 739-40 (emphasis in original).[6]

This is precisely the rule of law followed by the District Court in this case: "[Under section 2403(b)] the state has all the rights of a party to the extent necessary for the presentation of facts and law concerning *the constitutionality of section 647(c).* . . . . [The issue of vacatur] "has no bearing on the constitutionality of § 647(c)." *Blair II*, 795 F. Supp. at 318 (N.D. Cal. 1992) (App. C at 70) (emphasis in original).[7]

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[6] *Yniquez* also stressed "[i]t is only because we hold that [the initiative's proponents] may appeal that we conclude that there is such a proceeding and that the Attorney General may, therefore, pursuant to § 2403(b), make an argument regarding constitutionality." 939 F.2d at 739. The Attorney General could not take an appeal from the trial court's decision because he had been dismissed from the case below on his own motion. *Id.* at 738. This is in contrast to the state intervenor in *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986), which had been a section 2403 intervenor in the trial and appellate courts, and thus, as an intervenor below, was in position to take an appeal to the Supreme Court on the constitutional issues.

The facts of this case are similarly different from *Maine*. Here, the State was a section 2403 intervenor below, *but* the action was settled by a consent judgment that did not preserve (or even mention) appellate rights. *Blair*, 38 F.3d at 1518-20 (App. A at 35-36). In *Maine*, however, the defendant had entered a guilty plea on the condition that the constitutional issue would remain subject to appeal. 477 U.S. at 136-37.

[7] The Ninth Circuit's affirmance is based on similar reasoning:

(footnote continued on following page)

There is thus no conflict among the courts, and no unsettled question of import regarding the application of section 2403, which warrants a writ of certiorari in this case.

D. The Federal Courts Have No Jurisdiction over the State's Purported Appeal Because the Consent Judgment Eliminated Any Article III Case or Controversy

Section 2403 intervenors are not exempt from the limitations of Article III's case or controversy requirement, any more than the original parties or Rule 24 intervenors in federal court litigation. *E.g.*, *Maine*, 477 U.S. at 136-37 (intervenor). In fact, it would be illogical (as well as unconstitutional) to afford a section 2403 statutory *amicus* greater appeal rights than a regular party from whom the section 2403 intervenor's rights are derived. Here the case or controversy was based solely on Blair's claim under 42 U.S.C. § 1983 for damages

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(footnote continued from previous page)

> The district court properly held that the motion to vacate the consent judgment had nothing to do with the "facts and law relating to the question of [the] constitutionality" of section 647(c). 28 U.S.C. § 2403(b). Though we understand the State's interest in vacating the consent judgment so that it could obtain review of the constitutionality of section 647(c), 28 U.S.C. § 2403(b) does not allow a State standing to participate in a motion where questions of constitutionality are not among the issues argued.

Blair, 38 F.3d at 1522; *accord Vietnamese Fishermans' Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) (denying intervention under section 2403, relying on the limitation to "presenting evidence and arguments in support of the constitutionality of the statute").

resulting from the violation of his constitutional rights. When that claim was resolved by settlement, which was memorialized in a consent judgment, the Article III case or controversy -- and any subject matter jurisdiction of the federal courts -- terminated. *Blair*, 38 F.2d at 1518-20 (App. A at 31).

It is an unremarkable axiom that when a case or controversy is resolved, no jurisdiction remains to support intervention. In *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978), the First Circuit held that no jurisdiction remained to support federal intervention under section 2403 (or Rule 24) after the creditor withdrew its claim to enforce bankruptcy conflicts provisions, and mooted the case or controversy over whether those provisions were constitutional.[8/] In *Ruotolo*, the United States argued, as does the State here, that its strong interest in the constitutionality of the bankruptcy statute was a sufficient replacement for Article III's case or controversy prerequisite to federal jurisdiction:

> [The United States] . . . urges the desirability of a dispositive ruling in this untested area. While we can appreciate that a ruling might be useful, we are unable to see how the case when decided below, or on this appeal, met or meets the justiciability requirements of article III, section 2, of the Constitution. We therefore dismiss the appeal.

[8/] In *Yniguez*, the Ninth Circuit similarly ruled that "[b]efore the Attorney General can assert any right at all there must be a viable proceeding in which that right may be asserted . . . ." 939 F.2d at 739.

Ruotolo, 572 F.2d at 338.

Understandably, the State of California is anxious to revive litigation on the constitutional issues, but no case or controversy remains between Blair and the City to satisfy Article III's requirements for federal jurisdiction.[9/] Thus, this would be an inappropriate case in which to address the rights provided by section 2403, even if such a review were necessary (which it is not), because the jurisdictional defect would bar the Court from reaching the merits of the State's purported appeal.[10/]

9/ The truer measure of the State's purported interest in defending the constitutionality of section 647(c) is perhaps more accurately gauged by its disinterest in becoming a party defendant to this lawsuit.

10/ The issues in this petition are not based on whether the federal courts have the power to consider whether to vacate judgments after the case or controversy has been mooted on appeal -- they clearly do. *Bancorp*, 115 S. Ct. at 390 ("[T]his Court may not consider [] merits [of a judgment mooted while awaiting review], but may make such disposition of the whole case as justice may require.") (*citing Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944)). Instead, the issues are based on whether the State has standing to appeal or to be heard on a Rule 60(b) motion to vacate a consent judgment. As the parenthetical quotation to *Bancorp* reflects, the federal courts do not have subject matter jurisdiction over the State's appeal. The State's standing to bring a Rule 60(b) motion is foreclosed, not by constitutional strictures, but by the limitations of section 2403 discussed in subsection C above.

E. *Bancorp* Is Irrelevant to the State's Standing

The State's misplaced reliance on *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), which did not even involve section 2403 in any respect, proposes an improper departure from traditional, well established principles governing standing. If accepted, the State's proposal would create "equitable" standing for section 2403 intervenors to seek *vacatur* in the absence of both a case or controversy *and* a constitutional issue. The lower courts in this action have correctly rejected this proposal.

Bancorp is completely irrelevant to any of the issues in this petition. *Bancorp* addresses "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." *Id.* at 388-89.[11/] No party intervened in *Bancorp* under section 2403, and

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11/ *Bancorp* holds that:

> [M]ootness by reason of settlement does not justify vacatur of a judgment under review. This does not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur -- which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed.

Bancorp, 115 S. Ct. at 393.

Bancorp provides no guidance regarding either section 2403's statutory limitation or the ability of section 2403 intervenors to satisfy Article III's constitutional requirements.

F. The State's Policy Argument Fails Because the State Lost Appeal Rights, Not by Happenstance, but Through its Own Decision to Be a Limited Intervenor Rather than a Party Defendant

The State's primary argument is that *Bancorp* confers upon the State standing to appeal or a right to seek *vacatur* of the declaratory judgment, because the mooting of the case or controversy by the settlement among the original parties was beyond the control of the State. State's Petition at 13-15. As described above, this policy argument will never be reached because the State lacks standing under Article III and section 2403. Even on its own merits, however, the State policy argument crumbles.

The State intentionally sought limited intervention and only claimed broader rights *after* the consent judgment was entered. However, the State has never sought to be a party defendant. The State's chosen course preserved to it the benefit of avoiding liability. The State's choice also exposed it to particular risks, one of which was that the parties to the case could settle the action without a State veto.

The State's change of heart is not excused by the Rule 68 consent judgment's foreclosure of the City's right to appeal, any more than the decision of the Arizona Governor in *Yniguez* to forego an appeal excused the Attorney General's change in position in that case.

There the Ninth Circuit concluded that the Attorney General was "judicially estopped" from intervening under Rule 24 because he had successfully convinced the District Court he was not a proper party to the case. *Yniguez*, 939 F.2d at 738. As in *Yniguez*, the State of California must now live with the consequences of its judicial election:

> To allow a party who steps off the statutory path [for appeal] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would -- quite apart from any considerations of fairness to the parties -- disturb the orderly operation of the federal judicial system.

Bancorp, 115 S. Ct. at 392.

The State's ultimate objective is to erase the District Court's declaration that California Penal Code § 647(c) is unconstitutional, because the State assumes that the opinion on the merits is wrong and thus inappropriately "haunts and thereby chills" enforcement of the statute. (State's Petition at 11). *Bancorp* also soundly rejects this use of *vacatur*:

> It seems to us inappropriate, however, to vacate mooted cases, in which we have no power to decide the merits, on the basis of assumptions about the merits.

Id. at 392-93.

In sum, the State's own conduct has deprived it of an opportunity to appeal. The State would not be entitled to *vacatur* even had the Constitution and Congress granted it standing.

V. CONCLUSION

For the foregoing reasons, Respondent Celestus Blair, Jr. respectfully suggests that the State of California's petition for a writ of certiorari be denied.

Respectfully Submitted,

PETTIT & MARTIN

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PROOF OF SERVICE BY MAIL

I, D. Kirk Jamieson, the undersigned, hereby certify and declare under penalty of perjury that the following statements are true and correct:

1. I am an attorney admitted to the Bar of the State of California, and that service was made at that attorney's direction.

2. I am over the age of 18 years and am not a party to the within cause.

3. My business and mailing address is Pettit & Martin, 101 California Street, Suite 3500, San Francisco, California 94111.

4. I am familiar with my employer's mail collection and processing practices; know that said mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail; and know that postage thereon is fully prepaid.

5. Following said practice, on March 24, 1995, I served a true copy of the attached document titled exactly BRIEF IN OPPOSITION by placing it in a sealed envelope (and depositing it in regularly maintained interoffice mail) addressed to the following:

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